Dec 3 Affd in Cons. Dec

SUPREME COURT OF THE UNITED STATES.

No. ~~181.~~ 107.

YORK MANUFACTURING COMPANY, PL'FF IN ERROR,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE

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No. 181.

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1 Pleas in the circuit court of the United States of America, for the eighth circuit and northern district of Illinois, before the judges thereof at the city of Chicago, in the district aforesaid, on Wednesday, the twenty-fifth day of March, in the March adjourned term of said court, in the year of, our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

YORK MANUFACTURING COMPANY
vs.
ILLINOIS CENTRAL RAILROAD COMPANY.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and sixty, came said plain-
2 tiff, by its attorney, and filed in the office of the clerk of the circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, its præcipe praying the issue of a writ of summons against said defendant in a plea of trespass on the case, damages twelve thousand dollars, returnable on the third Monday of December, in the December term of said court, A. D. 1860, and also at the same time filed its bond for costs in said entitled cause, and its declaration against said defendant in the plea aforesaid, which said bond and declaration are in the words and figures following, to wit:

Circuit court, December term, A. D. 1860.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

YORK MANU'F'G CO.
vs.
ILL. CENT. RAILR'D CO. } In.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in the action, or to any of the
3 officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against my property for any costs taxed against it.

Dated this twenty-eighth day of November, A. D. 1860.

CHAS. HITCHCOCK.

Endorsed: Filed Nov. 28, A. D. 1860.

WM. H. BRADLEY, *Clerk.*

Circuit court of the United States for the seventh circuit and northern district of Illinois, of the December term, A. D. 1860.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The "York Manufacturing Company," a corporation created by and doing business in the State of Maine, and a citizen thereof, by Gallup and Hitchcock, its attorneys, complains of the "Illinois Central Railroad Company," a corporation created by and doing business in the State of Illinois, a citizen thereof, and resident of said district, which is summoned to answer the plaintiff of a plea of trespass on the case.

4 For that whereas the said defendant, before and at the time of the delivery of the goods and chattels to it, as hereinafter last mentioned, was, and from thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, to wit, from Cairo to Chicago, to wit, at said northern district. And whereas also the said plaintiff, whilst the said defendant was such common carrier, as aforesaid, to wit, on the eleventh day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at Cairo, to wit, at said district, caused to be delivered to the said defendant, and the said defendant then and there accepted, and received of and from the said plaintiff divers goods and chattels, to wit, two hundred and one bales of cotton, of the said plaintiff, of great value, to wit, of the value of twelve thousand dollars, to be safely and securely carried and conveyed by the said defendant from Cairo aforesaid to Chicago aforesaid, and then, to wit, at Chicago aforesaid, safely and securely to be delivered for the said plaintiff for certain reasonable reward to the said defendant in that behalf. Yet the said defendant, not regarding its duty as such

5 common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said two hundred and one bales of cotton aforesaid from Cairo aforesaid to Chicago aforesaid, nor there, to wit, at Chicago aforesaid, safely or securely deliver the same for the said plaintiff, but, on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness, negligence and default of the said defendant in the premises, the said two hundred and one bales of cotton aforesaid, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

For that whereas also the said defendant, before and at the time of the delivery of the goods and chattels to it, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, a common carrier of

6 goods and chattels for hire, to wit, from Cairo to Chicago, to wit, at said northern district; and whereas also the said plaintiff, whilst the said defendant was such common carrier as aforesaid, to wit, on the eighth day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at Memphis, to wit, at the district aforesaid, caused to be delivered to the said defendant, and the said defendant then and there accepted and received of and from the said plaintiff divers other goods and chattels, to wit, two hundred and one bales of cotton, of the said plaintiff, of great value, to wit, of the value of twelve thousand dollars, to be safely and securely carried and conveyed by the said defendant from Memphis aforesaid to Boston, and there, to wit, at Boston aforesaid, safely and securely to be delivered for the said plaintiff for certain reasonable reward to the said defendant in that behalf. Yet the said defendant, not regarding its duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey

7 the said two hundred and one bales of cotton last mentioned from Memphis aforesaid to Boston aforesaid, nor there, to wit, at Boston aforesaid, safely or securely deliver the same for the said plaintiff, but, on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness, negligence and default of the said defendant in the premises, the said two hundred and one bales of cotton last aforesaid, being of the value aforesaid, afterwards, to wit, the

day and year aforesaid, at the district aforesaid, became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

For that whereas also the said defendant, before and at the time of the delivery of the goods and chattels, to wit, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, to wit, from Memphis to Boston, to wit, at the district aforesaid; and whereas also the said plaintiff, whilst the said
8 defendant was such common carrier as aforesaid, to wit, on the eighth day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at Memphis, to wit, at said district, caused to be delivered to the said defendant, and the said defendant then and there accepted and received of and from the said plaintiff divers other goods and chattels, to wit, two hundred and one bales of cotton, of the said plaintiff, of great value, to wit, of the value of twelve thousand dollars, to be safely and securely carried and conveyed by the said defendant from Memphis aforesaid to Boston aforesaid, and there, to wit, at Boston aforesaid, safely and securely to be delivered for the said plaintiff for certain reasonable reward to the said defendant in that behalf. Yet the said defendant, not regarding its duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said two hundred and one bales of cotton last aforesaid from
9 Memphis aforesaid to Boston aforesaid, nor these, to wit, at Boston aforesaid, safely or securely deliver the same for the said plaintiff, but, on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness, negligence and default of the said defendant in the premises, the said two hundred and one bales of cotton last aforesaid, being of the value aforesaid, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

For that whereas also afterwards, to wit, on the day and year aforesaid, at the district aforesaid, the said defendant, at its special instance and request, had the care and custody of divers other goods and chattels of the number, quality, quantity, description and value of those in the said first count mentioned of the said plaintiff. Yet the said defendant, not regarding its duty in that behalf, did not, nor would, whilst it so had the care
10 and custody of the said last-mentioned goods and chattels, take due and proper care of the same, or any part thereof, but wholly neglected so to do, and took such bad care thereof that afterwards, to wit, on the day and year aforesaid, the said last-mentioned goods and chattels became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

For that whereas also the said plaintiff heretofore, to wit, on the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty, at the district aforesaid, was lawfully possessed as of its own property of certain goods and chattels, to wit, two hundred and one bales of cotton, of great value, to wit, of the value of twelve thousand dollars of lawful money of the United States, and being so possessed, the said plaintiff afterwards, to wit, on the day and year last above mentioned, at the district aforesaid, casually lost the said goods and chattels out of its possession, and the same afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, came to the possession of the
11 said defendant by finding; yet the said defendant, well knowing the said goods and chattels to be the property of the said plaintiff, and of right to belong and appertain to it, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this

behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do, and hath hitherto wholly refused so to do, and afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, converted and disposed of the said goods and chattels to its own use, to the damage of the said plaintiff of twelve thousand dollars and therefore it brings its suit, &c.

GALLUP & HITCHCOCK,
Att'ys for Plf.

Endorsed: Filed Nov. 28, 1860.

WM. H. BRADLEY, *Clk.*

On the same day, to wit, the twenty-eighth day of November, A. D.
12 1860, a writ of summons was issued out of said clerk's office against said defendant in said plea, which said writ, togther with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Illinois Central Railroad Company, if it shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the December term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto York Manufacturing Company in a plea of trespass on the case to its damage, as it alleges, of twelve thousand dollars; and have you then and there this writ.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court
13 of the United States of America, at Chicago aforesaid, the twenty-eighth day of November, in the year of our Lord one thousand eight
[SEAL.] hundred and sixty, and of our independence the 85th year.

WM. H. BRADLEY, *Clerk.*

I have this 1st day of December, 1860, served the within writ on the within named, the Illinois Central Railroad Company, by placing a copy of the same in the hands of W. K. Ackerman, treasurer of the aforesaid Illinois Central Railroad Company.

THOMAS HAYNE,
U. S. Marshal, Northern District of Illinois.
By WM. B. SNOWHOOK,
Deputy.

Endorsed: Filed Dec. 14, A. D. 1860.

WM. H. BRADLEY, *Clerk.*

On this day, to wit, the thirteenth day of December, A. D. 1860, came said defendant, by its attorneys, and filed in said clerk's offic eits plea in said entitled cause; which said plea is in the words and figures following, to wit:

14 Circuit court of the United States for the seventh circuit and northern district of Illinois, of the December term, A. D. 1860.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

THE ILLINOIS CENTRAL RAILROAD COMPANY } *ads.* THE YORK MANUFACTURING COMPANY.

And the said defendant, by Stuart & Ayer, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this it, the said defendant, puts itself upon the country, &c.

STUART & AYER,
Att'ys for Defendants.

Endorsed: Filed Dec. 13, 1860.

WM. H. BRADLEY.

And refiled June 26, 1862.

WM. H. BRADLEY, *Clk.*

15 On this day, to wit, the sixth day of February, A. D. 1861, in the December term of said court, A. D. 1860, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

YORK MANUFACTURING COMPANY *vs.* ILLINOIS CENTRAL RAILROAD COMPANY. } Trespass.

On motion of the plaintiff, by its attorneys, leave is given by the court to amend its declaration.

On the same day, to wit, the sixth day of February, A. D. 1861, came said plaintiff, by its attorney, and filed additional counts to its declaration; which said counts are in the words and figures following, to wit:

Circuit court of the United States for the seventh circuit and northern district of Illinois, of the December term, A. D. 1860.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

16 YORK MANUFACTURING COMPANY *vs.* ILLINOIS CENTRAL RAILROAD COMPANY.

For that whereas also the said defendant, before and at the time of the delivery of the goods and chattels to it, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, to wit, from Cairo to Boston, to wit, at said northern district. And whereas also the said plaintiff, whilst the said defendant was such common carrier as aforesaid, to wit, on the eleventh day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at Cairo, to wit, at said district, caused to be delivered to the said defendant, and the said defendant then and there accepted and received of and from the said plaintiff divers other goods and chattels, to wit, two hundred and one bales of cotton, of the said plaintiff, of great value, to wit, of the value of twelve

thousand dollars, to be safely and securely carried and conveyed by
17 the said defendant from Cairo aforesaid to Boston aforesaid, and there, to wit, at Boston aforesaid, safely and securely to be delivered for the said plaintiff for certain reasonable reward to the said defendant in that behalf; yet the said defendant, not regarding its duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud, and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said two hundred and one bales of cotton, last aforesaid, from Cairo aforesaid to Boston aforesaid, nor there, to wit, at Boston aforesaid, safely or securely deliver the same for the said plaintiff, but, on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness, negligence and default of the said defendant in the premises, the said two hundred and one bales of cotton last aforesaid, being of the value aforesaid, afterwards, to wit, on the day and year last aforesaid, at
18 the district aforesaid, became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

For that whereas also the said defendant, before and at the time of the delivery of the goods and chattels to it, as hereinafter next mentioned, was, and from thence hitherto hath been, and still is, a common carrier of goods and chattels for hire, to wit, from Cairo to Chicago, to wit, at said northern district; and whereas also the said plaintiff, whilst the said defendant was such common carrier as aforesaid, to wit, on the eleventh day of November, in the year of our Lord one thousand eight hundred and fifty-nine, at Cairo, to wit, at said district, caused to be delivered to the said defendant, and the said defendant then and there accepted and received of and from the said plaintiff divers other goods and chattels, to wit, two hundred and one bales of cotton, of the said plaintiff, of great value, to wit, of the value of twelve thousand dollars, to be safely and securely carried and conveyed by
19 the said defendant from Cairo aforesaid to Boston, to wit, at the district aforesaid, and then, to wit, at Boston aforesaid, safely and securely to be delivered for the said plaintiff for certain reasonable reward to the said defendant in that behalf.

Yet the said defendant, not regarding its duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the said two hundred and one bales of cotton, last aforesaid, from Cairo aforesaid, to Boston aforesaid, nor there, to wit, at Boston aforesaid, safely or securely deliver the same for the said plaintiff, but, on the contrary thereof, the said defendant, so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises, that by and through the carelessness, negligence and default of the said defendant in the premises, the said two hundred and one bales of cotton last aforesaid, being of the value aforesaid, after-
20 wards, to wit, on the day and year last aforesaid, at the district aforesaid, became and were wholly lost to the said plaintiff, to wit, at the district aforesaid.

CHAS. HITCHCOCK, *Att'y for Pl'ff.*

Endorsed: Filed Feb'ry 6, 1861.

WM. H. BRADLEY, *Clk.*

On this day, to wit, the twenty-sixth day of June, in the May adjourned term of said court, A. D. 1862, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Case.

Now, at this day, come the parties, by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, John Dixon, W. W. Carothers, Orville Slusser, Henry Sloan, Thomas J. Rudd, James G. Griffith, John Parmly, E. J. Kilgour, James M. Whipple, John D.
21 Carman, George Wolff, and Lewis Harmell, who were duly elected, tried, and sworn, and, after proceeding in the trial until the hour of adjournment without concluding the same, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the twenty-seventh day of June, in the May adjourned term of said court, A. D. 1862, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Case.

Now come again the parties, by their attorneys, and now come also the jury heretofore empannelled in this cause, and, after hearing the concluding evidence, and a part of the arguments of counsel, the hour of adjournment having arrived, the concluding arguments of counsel are postponed until to-morrow morning.

22 On this day, to wit, the twenty-eighth day of June, in the May adjourned term of said court, A. D. 1862, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Case.

Now come again the parties, by their attorneys, and now come also the jury heretofore empannelled in this cause, and, after hearing the concluding arguments of counsel, and receiving instructions from the court, the jury retire to consider of their verdict; and it is ordered by the court, by agreement of the parties by their attorneys, that the jury, when they shall have agreed upon their verdict, may sign and seal the same, and deliver it to the clerk or marshal and disperse.

On this day, to wit, the thirtieth day of June, in the May adjourned
23 term of said court, A. D. 1862, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Case.

The jury heretofore empannelled in this cause this morning returned into court the following verdict, to wit: We, the jury, find the defendant not guilty, and the plaintiff, by its attorney, moves the court for a new trial.

On this day, to wit, the sixth day of August, in the July term of said court, A. D. 1862, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Case.

Now come the parties, by their attorneys, and call up for disposition
24 the motion of the plaintiff heretofore entered herein by its attorney;

and the court, after hearing a part of the arguments of counsel, the further hearing is postponed until to-morrow morning.

On this day, to wit, the seventh day of August, in the July term of said court, A. D. 1862, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Case.

Now come again the parties, by their attorneys; and the court, after hearing the concluding arguments of counsel upon the motion of the plaintiff heretofore entered herein by its attorneys for a new trial of this cause, and not being sufficiently advised, takes time to consider.

25 On this day, to wit, the twenty-fifth day of March, in the March adjourned term of said court, A. D. 1863, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY. } Trespass on the case.

The court having fully considered, and being now sufficiently advised upon the motion of the plaintiff heretofore entered herein by its attorneys for a new trial of this cause, overrules said motion. It is therefore considered and adjudged by the court that the said defendant be discharged herein, and that it go hence without day, and that it have and recover of and from the said plaintiff its costs and charges by it, about its defence in this behalf expended, amounting to the sum of forty-six dollars and ninety-five cents, and that it have execution therefor.

26 On the trial of the foregoing cause the plaintiff took exceptions, which were duly signed and sealed by the judge of said court, which said exceptions are in the words and figures following, to wit:

Circuit court of the United States for the northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY.

Be it remembered that on the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and sixty-two, being one of the days of the May term of said court, this cause came on to be heard before the Hon. Thomas Drummond, judge, and a jury; and thereupon the plaintiff, to sustain the issue on its part, read in evidence the depositions of Samuel Rider and George W. Ford tending to show the delivery, by the steamboat Adriatic, of two hundred and one bales of cotton to the defendant at

27 Cairo, for carriage, on the eleventh day of November, A. D. 1859, and the loss thereof while in the possession of the defendant. And the plaintiff, further to sustain the issues on its part, read in evidence the deposition in chief of Thomas Trout, taken on the day of , A. D. 1860, and placed on file in this cause on the 14th day of March, A. D. 1861, which was in the words and figures following:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer. My name is Thomas Trout; age, sixty-one years; occupation, merchant.

Interrogatory second. Do you know the parties, plaintiff and defendant,

in the caption to these interrogatories mentioned, or either, and which of them; and how long have you known them, respectively?

Answer. I only know the treasurer of the York Manufacturing Company, and I know the agents of the Illinois Central Railroad Company, of this city, (Harris, Hunt & Co.,) whom I have known for about three years, and the treasurer of the York Manufacturing Company I have known six months.

28 Interrogatory third. Did you, in the month of November, A. D. 1859, purchase and ship cotton for and on account of the plaintiff in the above-entitled cause? And if yea, state the date of such purchase and shipment; state the number of bales, the weight, quality, and value in Memphis, and the marks upon the bales when shipped; state also the name of the steamer by which the same was shipped from Memphis.

Answer. We did (Tho's Trout & Son) ship and purchase cotton, on account of the York Manufacturing Company, on November 8th, 1859; shipped on that day two hundred and one bales; the quality was strict middling; the mark was Y. M. C.; shipped on steamer Adriatic; the weight was 99,865 pounds; the value $\$10,545\frac{70}{100}$.

And thereupon the defendant, to sustain the issue on its part, offered in evidence the first and second cross-interrogatories to Thomas Trout, and his answers thereto, being a part of the same deposition so taken and filed as aforesaid, which were in the words and figures following:

First. If, in answer to the third interrogatory, you shall state that in the month of November, A. D. 1859, you purchased and shipped cotton from Memphis for the plaintiff, as inquired of, you will please state whether

29 or not you made at Memphis any contract for the shipment or transportation of the same; if yea, with whom? If you shall say with Harris, Hunt & Co., state what relation (if any) Harris, Hunt & Co. maintained with the defendant in respect of said contract; did they or not act as agents of the defendant in making said contract for transportation? Was the contract reduced to writing? If yea, what was the form of it? If you shall say that it was in form of a shipping bill, or bill of lading, state whether one or more of said contracts or bills of lading was or were delivered to you. If yea, have you it, or either of them, now in your possession or within your reach or control? If yea, please annex the same or a certified and proved copy to your deposition, and let the same be properly identified by the commissioner in his return. If you have neither of said bills in your possession or within your control, please state what became of the copy or copies you received, and explain how or why you cannot, on your examination, produce the same or a copy.

Answer. We made a contract with Harris, Hunt & Co. to ship the

30 cotton from Memphis to Boston, Mass. I do not know what relation Harris, Hunt & Co. maintained with defendant. They signed the bill of lading as agent for Illinois Central R. R. Co. The contract was in the form of a bill of lading. Two bills of lading were delivered to us; I have one; the other was sent to the York Manufacturing Co. The copy of said bill of lading I make a part of my deposition, and mark Exhibit A.

Second. Please inspect the paper purporting to be a bill of lading, or shipping bill, which is annexed and marked "Exhibit A," (with red ink,) and state whether the same is a true copy of the contract you made with Harris, Hunt & Co. for the shipment and transportation of said cotton, or of the bill of lading given to you by them, and whether you had any other or different contract with, or bill of lading from them.

Shipped by Thomas Trout & Son, in good order and condition, on board the good steamboat called the Adriatic, whereof is master for the present voyage, now lying at Memphis, and bound for Cairo; being marked

31 and numbered as below, and are to be delivered, without delay, in the like good order and condition, at the aforesaid port of Boston, Mass., (fire and the unavoidable dangers of the river only excepted,) unto Sam'l Batchelder, treas., or to his assigns, he or they paying freight, at the rate of four $\frac{75}{100}$ dollars per bale from Memphis to Boston, all rail from Cairo.

In witness whereof, the master or clerk of said steamboat hath affirmed to 4 bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Y. M. C., $1 a. 201 (two hundred and one) bales cotton.

(Signed) HARRIS, HUNT & CO.,
Ill. Central R. R.

"Exhibit A" to my deposition.

THO. TROUT.

Answer to 2. The same is a true copy from my books.

To the reading of which in evidence the plaintiff, by its attorney,
32 objected, upon the ground that the supposed contract for carriage between the parties appeared by the testimony to be in writing, and that no foundation had been laid for the introduction of secondary evidence of the contents thereof, either by notice to the plaintiff, or its attorney, to produce the original, or by proof of the loss or destruction thereof, or of any efforts on the part of the defendant to produce the same. And further objected to the reading thereof, upon the ground that the copy of the contract, to which the witness testified, appeared to have been attached to the cross-interrogatories, and to the commission, before it issued by the attorney for the defendant, and suggested material matter to which the witness had not been examined in chief; but it appearing that no motion to suppress said parts of said deposition had been made or filed in the cause, and that they were for the first time objected to by the plaintiff, when offered as evidence by the defendant on the trial, and it also appearing that the paper was copied from the original in a book which belonged to the witness, and
33 that he had already identified the same paper in his answer to the first cross-interrogatory, the court overruled the objections and allowed the said cross-interrogatories and the answers thereto to be read to the jury, to which the plaintiff, by its attorney, then and there excepted. The defendant did not offer to show that notice had been given to the plaintiff, or its attorney, to produce the original contract or bill of lading, nor that the same had been lost or destroyed, nor any efforts to produce the same, save as appears in said deposition of Thomas Trout.

And the plaintiff thereupon offered to read to the jury the third cross-interrogatory, and the answer of the said Thomas Trout thereto, as explanatory of said contract, which were in the words and figures following:

Third. If you shall not be able to answer definitely, and from the original bills of lading, or from copies in your possession or within your reach, the second cross-interrogatory, then please to state whether, in whatsoever contract you made with Harris, Hunt & Co., (in respect of the transportation aforesaid,) they reserved (in behalf of their principals) in said contract an exception as to their risk against "fire and the unavoidable dangers of the river."

34 Answer 3. I have produced a copy, herewith filed and marked "Exhibit A." The bill of lading was signed by Harris, Hunt & Co., after the delivery on the boat, and after it was signed by the clerk of the boat. I understood the shipping bill as a receipt for the cotton, and not a contract. I did not examine the shipping bill, and my attention was not called to the "fire clause." My son took the shipping bill, and had no au-

thority to make any contract, and I had no authority to make a contract "excepting fire," from the plaintiffs.

And to the reading to the jury of the following words, in said answer, viz:

"I understood the shipping bill as a receipt for the cotton, and not a contract." The defendant, by its attorney, objected upon the ground that the witness could not give his understanding or construction of a written contract, and the court sustained the objection, and excluded such words from the jury; to which the plaintiff, by its attorney, then and there excepted.

And thereupon the plaintiff, further to sustain the issue on its part,
35 read the deposition of Robert Scott, tending to prove the value of said cotton.

And thereupon the plaintiff rested its case.

The defendant, to maintain the issue on its part, offered testimony tending to show that Harris, Hunt & Co. were its agents at Memphis in the fall of 1859, and authorized to contract for the carriage of cotton from Memphis to Boston, and that the cotton in question was brought to Cairo by the steamboat Adriatic, under a bill of lading, in the words and figures following:

Shipped in good order, and well conditioned, by Harris, Hunt & Co., on board the good steamboat Adriatic, whereof is master, now lying at the port of Memphis and bound for Cairo, being marked as per margin and are to be delivered in like good order and condition, without delay, at Cairo, (the dangers of the river and fire only excepted,) unto Abbott, agent, or to his assigns, he or they paying freight on the same, at fifty cents per bale, and charges through to Boston, at $4\frac{75}{100}$ per bale, via Ill. C. R'd, and connections.

In witness whereof, the master or clerk of said steamboat hath
36 affirmed to five bills of lading, all of this tenor and date, one of which being accomplished, the other to stand void.

Dated at West Point, Ark., this 8th day of November, 1859.

Mark: Y. M. C.
Articles: (201) Two hundred and one bales cotton.
Forwarded to Sam'l Batchelder, treas'r, Boston, Mass.

W. J. TURNER, *Clk.*

Which said bill of lading was, by the defendant's counsel, offered in evidence and read to the jury; and that the said cotton was lost by fire whilst lying on a barge, into which it had been discharged from the steamboat Adriatic, at the levee in Cairo, and that the defendant was not negligent in guarding and protecting it from such loss.

The plaintiff thereupon offered in evidence a stipulation, in the words and figures following:

Circuit court of the United States, northern district of Illinois.

THE YORK MANUFACTURING COMPANY
vs.
THE ILLINOIS CENTRAL RAILROAD.

37 It is hereby stipulated that the following copies of written instruments may be read in evidence on the trial of this cause as originals, and their execution is hereby admitted:

MEMPHIS, *Oct.* 3, 1859.

Messrs. HARRIS & HUNT:

D'R SIRS: I annex you rates on cotton to the various points; good until further advised.

Cairo to Phil. or Balt.,	62 c. or	$3	10	pr. bale.	
" " New York,	67 c. or	3	35	"	"
" " Boston,	72 "	3	60	"	"
" " Albany or Troy,	62 "	3	10	"	"

The above rates are all rail from Chicago or Cairo.

Cairo to New York,	60 or	$3		per bale.
" " Boston,	65 or	3	25	" "
" " Albany or Troy,	54 "	2	70	per bale.

The above is all rail Cairo to Detroit or Toledo, and thence lake and canal.

Resp. yours,

ROB'T FORSYTHE,
Gen. Ft. Ag't Ill. C. R. R.

We will recognize your contracts and pay 5 c. per bale com.,
38 and can ship the all-rail cotton via Penn. R. R., excepting Boston.

R. F.

Mr. ABBOTT, ag't, to st'r ADRIATIC, Dr.

Mark.	Articles.	Rate.	Amount.
Various...	202 bales cotton	50	$101 00
"	100 " "	50	50 00
			151 00
Y. M. C...	201 bales cotton	50	100 50
			251 50

11 November, 1859.

Rec'd payment,

W. J. TURNER, *Clerk.*

The defendant reserves the right to produce the originals of said instruments, or either of them, in place of said copies on the trial, and of introducing any and all competent evidence respecting the giving of the same.

SCATES, McALLISTER & JEWETT,
Att'ys for Def't.

And also testimony tending to show that the defendant was negligent in guarding and protecting the cotton in question.

And thereupon the plaintiff prays the court to instruct the jury as follows, viz:

39 1. If the jury shall believe, from the evidence, that the cotton was delivered by the steamer Adriatic at Cairo, according to the usual course of business, in like circumstances, at that place, and with the Illinois Central Railroad Company, then such delivery was sufficient to charge the company with its receipt for carriage.

2. "The burden of proving a special contract, limiting its common-law lia-

bility, lies on the carrier, and nothing short of an express stipulation by parol or in writing can discharge it from duties which the law has annexed to its employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

3. The burden lies upon the carrier of proving the assent of some authorized agent of the plaintiff to the terms of the special contract, limiting the common-law liability of the defendant.

40 4. The burden lies upon the carrier to prove a consideration for the special contract, exempting the carrier from its common-law liabilities for loss by fire, and without such consideration the contract has no legal validity.

5. The mere receipt of the cotton for carriage, according to the usual course of business of the defendant, is not a sufficient consideration to support the special contract.

6. If the jury shall find, from the evidence, that there was a special contract between the parties, by which the defendant was released from its common-law liability from loss from fire, yet the defendant is liable if it did not take the same care to protect and secure the cotton that a prudent man would have taken of his own property under like circumstances, and the loss resulted from the want of such care.

But the court refused to give the instructions in the form as requested by plaintiff's counsel, and each of them, (to which refusal the said coun-

41 sel then and there excepted,) and the court thereupon, of its own motion, charged the jury substantially as follows:

Waiving some questions which were discussed in the argument, I think there can be no doubt of the correctness of this principle, that the defendant could, under the law, appoint agents at Memphis to make contracts for goods, wares, and merchandise to be carried over the road, and for the purpose of this case it is sufficient if there was a contract made at Memphis by Harris, Hunt & Co., acting for the defendant, with Thomas Trout & Son, acting for the plaintiff, for the transit of the cotton over the defendant's road on its way to Boston, especially as there is no controversy made, but that the cotton was actually delivered to and in possession of the agents of the defendant at Cairo, and consequently it was within the limits of the State of Illinois, and the charter of the company operated, of course, upon the subject-matter of the controversy.

This being so, it was competent for the defendant, through its agents, to make the same kind of contract, with the same restrictions and conditions as if made at Cairo. So that the first point to be determined is,

42 whether the defendant, through its agents at Memphis, made a contract for the transit of the cotton from Cairo over its road, what were the terms and conditions of that contract, and whether the cotton was shipped under the contract.

A bill of lading has been introduced, which refers to the cotton as having been shipped on board the steamer Adriatic for Cairo, by Thomas Trout & Son, "to be delivered without delay at the port of Boston, fire and the unavoidable danger of the river only excepted, to Samuel Batchelder (the treasurer of the plaintiff) or to his assignees, paying as freight $4 75 per bale, from Cairo to Boston by rail."

Mr. Trout, when asked in relation to his agency in the business transacted, says: "We had prchased and shipped, on account of the York Manufacturing Co., on the 8th of Nov., 1859, 201 bales; the quality was strictly middling, and marked Y. M. C.; they were put on the steamer Adriatic. We made a contract with Harris, Hunt & Co., to ship the cotton to Boston. They signed a bill of lading as agents for the I. C. R. R. Co."

Mr. Trout says that his attention was not called to the fire clause
43 in the bill of lading, and that he had no authority to ship the cotton under the restriction therein contained. It is not material as to the authority of Thomas Trout & Son from the plaintiff. They acted as the agents of the plaintiff; and if, as such, they shipped the cotton and made a contract with the defendant for its conveyance over the road, then the only contract that would be binding on the defendant, and which the plaintiff could enforce, would be the one so made, unless, indeed, the defendant knew Thomas Trout & Son were acting for the plaintiff, and that they exceeded their authority.

A bill of lading ordinarily contains a memorandum of the quantity and quality of the goods shipped, and in that respect may be explained; but in addition to this, it is also a contract, and has precisely the same effect as any other contract by which a party may receive property, and agree to transport and deliver it at a particular place for a fixed sum.

Now the question for you to determine is, was this property delivered to the agents of the defendant, and did they agree to receive, hold,
44 and transport it under this contract, which has been referred to? If so, then, as a matter of course, as above stated, it is the only contract by which the rights and liabilities of the parties are to be measured; and it is generally true that when goods are delivered to a carrier, either by land or by water, and a bill of lading is given, by which the carrier agrees to convey them for a fixed price, the bill of lading constitutes the agreement between the parties. And if the cotton was delivered under the bill of lading, as the agreement of the defendant for its transit over the road, then we must look to its terms in order to understand what the contract was.

In this bill of lading there is an exemption from liability on account of loss by fire; that is to say, the obligation of the carrier was not that of an insurer. The general rule is, that a common carrier is responsible for all losses except those occasioned by the act of God or the public enemies. It is competent, however, for the carrier to limit his responsibility, and there can be no doubt, particularly in relation to so inflammable a material as cotton, that the defendant could legally exempt itself from liability
45 by a special contract. And if it has so done, then, in case of loss by fire, it could only be responsible in a certain contingency to be hereafter considered. At the same time that there was a bill of lading executed by Harris, Hunt & Co., acting as agents of the defendant, the steamer Adriatic executed a bill of lading with H., H. & Co., by which it was agreed the cotton should be carried from Memphis to Cairo, and delivered to the agent of the defendant at fifty cents a bale, to be forwarded to Boston at $4 75 a bale, "by way of the Illinois Central railroad and its connections."

The steamer Adriatic arrived in Cairo on the 10th of November, (the shipment having been made on the 8th,) during the night. Shortly after its arrival, the cotton belonging to the plaintiff, with other cotton, amounting in all to 663 bales, was transferred to a barge lying by the side of the steamer. On the following day, November 11, the whole of the cotton was placed on the barge, the work being completed about noon; the barge was then fastened to the landing, some little distance from the steamer.
46 Not long after a fire—the origin of which is to us unknown—was discovered in the cotton, by which a considerable portion of it was destroyed, and there was a loss to the plaintiff of one hundred bales

Now, if you find that there was no contract limiting the liability of the defendant in case of loss by fire, then the defendant would be responsible for the loss when it came into its possession.

If you shall find there was a special contract exempting the defendant from liability in case of loss by fire, the remaining question is, whether the

defendant exercised reasonable care over the property. That is a question of fact for the jury to determine, under all the circumstances of the case.

The defendant, notwithstanding any exemption by virtue of a special contract, was obliged to exercise due care of the cotton—that is, such care as a prudent man would take of his own property. It seems to be conceded by the counsel, and such apparently is the weight of the evidence, that the proper way to carry cotton is, to leave it uncovered and place the necessary
47 number of persons to *to* watch it. The proof appears to establish, that if it can be absolutely and completely covered, so as to prevent all sparks from reaching it, that would be the surest way of transportation; but this has been found to be impracticable, as a general thing; so that it is left uncovered, in order that if it catch fire, it may be extinguished at the earliest possible moment.

It is, therefore, for you to say whether there was a want of due care, on the part of the defendant, of the cotton, and in order to determine that, you will consider, first, the value of the property; secondly, its peculiar character—its inflammability; thirdly, the circumstances under which it was placed and left in the barge as detailed by the witnesses.

If there was due care and an exemption from liability in consequence of a special contract, then the plaintiff cannot recover. If there was not due care used by the defendant, then, notwithstanding an exemption by special contract, the plaintiff can recover. If you should find for the plaintiff, the measure of damages will be the net value of the property in the
48 market to which it was to be carried—Boston—that is, the price of the cotton when it ought to have arrived there, deducting freight.

The case is important on account of the amount involved, and as establishing a rule for similar cases, as to the degree of care and vigilance to be used by railroad companies and others.

It appears that the cotton was insured by a Boston company, and that the loss has been paid to the plaintiff; the counsel of the plaintiff, however, states in court that the action is brought for the use of the insurance company. It was proper for the insurance company and the plaintiff to prosecute the suit in that manner, and consequently this circumstance should not affect the case either way.

And thereupon the jury returned a verdict, that the defendant was not guilty, and thereupon the court signed and sealed this bill of exceptions.

THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed March 25, 1863.

WM. H. BRADLEY, *Clk.*

49 On this day, to wit, the second day of December, A. D. 1863, came said plaintiff, and filed its bond, which said bond is in the words and figures following, to wit:

Circuit court of the United States for the ——— circuit, and northern district of Illinois.

YORK MANUFACTURING COMPANY *vs.* ILLINOIS CENTRAL RAILROAD COMPANY. } In error.

Know all men by these presents, that the York Manufacturing Company and Benj. E. Gallup, and Chas. Hitchcock, are held and firmly bound unto the above-named Illinois Central Railroad Company in the sum of five hundred dollars, to be paid to the said Illinois Central Railroad Company, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and admin-

istrators, firmly by these presents. Sealed with our seals, and dated the fourteenth day of July, in the year of our Lord one thousand eight hundred and sixty-three.

Whereas the above-named York Manufacturing Company hath pre-
50 sented a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the circuit court of the United States for the ——— circuit and northern district of *of* Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named York Manufacturing Company shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation to be void, otherwise to be and remain in full force and virtue.

In witness whereof, the said York Manufacturing Company has
[SEAL.] hereto affixed its seal, by the hand of its president and treasurer.

JAMES ELLISON, *Pres't.*

Witness: J. F. ELLISON.
JOHN M. BATCHELDER.

SAM'L BATCHELDER, *Treasurer.*
BENJ'N E. GALLUP. [SEAL.]
CHAS. HITCHCOCK. [SEAL.]

The security in the above bond is approved.

J. N. JEWETT.
Approved: THOMAS DRUMMOND.

51 Endorsed: Filed Dec. 2, 1863.

WM. H. BRADLEY, *Cl'k.*

On the same day, to wit, the second day of December, A. D. 1863, a citation issued, which citation, with the acknowledgment of service thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To the Illinois Central Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December instant, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit and northern district of Illinois, wherein the York Manufacturing Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and
52 speedy justice should not be done to the parties in *in* that behalf.

Dec. 2, 1863.

THOMAS DRUMMOND.

CHICAGO, *Dec.* 2, 1863.

I hereby acknowledge service of the within by copy, the day above written.
JOHN M. DOUGLAS, *Att'y Ill's Cen. R. R. Company.*

Endorsed: Filed Dec. 2d, 1863.

WM. H. BRADLEY, *Cl'k.*

53 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true transcript of the record and proceedings had in the cause wherein the York Manufacturing Company was plaintiff, and the Illinois Central Railroad Com-

pany was defendant, as the same appears from the records of said court, now remaining on file and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 3d day of December, A. D. 1863, and of our independence the 88th year.

[L. S.]

WM. H. BRADLEY, *Clerk.*

54 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America, to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also the rendition of a judgment, in a plea which is in the said court, before you, between York Manufacturing Company, plaintiff, and against Illinois Central Railroad Company, defendant, a manifest error hath happened, to the great damage of the said York Manufacturing Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf: You are hereby commanded that if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this thirteenth day of July, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the 88th year.

WM. H. BRADLEY, *Clerk.*

Filed 11th December, 1863.

55 In the Supreme Court of the United States, of the December term, A. D. 1863.

YORK MANUFACTURING COMPANY *against* ILLINOIS CENTRAL RAILROAD COMPANY. } In error.

And now comes the said York Manufacturing Company, plaintiff in error, and says, that the said judgment, by the said record verified, ought to be reversed, annulled and held for nought, for the many errors in the said record contained, and hereby assigns the same:

First. The court erred in allowing secondary evidence on the part of the defendant of an alleged special contract in writing between the parties, without proper foundation being laid therefor.

Second. The court erred in refusing to instruct the jury in regard to the delivery for carriage, according to the request of the plaintiff.

Third. The court erred in refusing to instruct the jury in regard to the elements and requisites of a special contract exempting a carrier from its common-law liability for loss by fire, according to the request of the plaintiff.

GALLUP & HITCHCOCK, *Att'ys for Plf. in Error.*

Filed 15th January, 1864.

istrators, firmly by these presents. Sealed with our seals, and dated the fourteenth day of July, in the year of our Lord one thousand eight hundred and sixty-three.

Whereas the above-named York Manufacturing Company hath pre-
50 sented a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the circuit court of the United States for the ——— circuit and northern district of *of* Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named York Manufacturing Company shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation to be void, otherwise to be and remain in full force and virtue.

In witness whereof, the said York Manufacturing Company has
[SEAL.] hereto affixed its seal, by the hand of its president and treasurer.

JAMES ELLISON, *Pres't.*

Witness: J. F. ELLISON.
JOHN M. BATCHELDER.

SAM'L BATCHELDER, *Treasurer.*
BENJ'N E. GALLUP. [SEAL.]
CHAS. HITCHCOCK. [SEAL.]

The security in the above bond is approved.

J. N. JEWETT.
Approved: THOMAS DRUMMOND.

51 Endorsed: Filed Dec. 2, 1863.

WM. H. BRADLEY, *Clk.*

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52 speedy justice should not be done to the parties in *in* that behalf.

Dec. 2, 1863.

THOMAS DRUMMOND.

CHICAGO, *Dec.* 2, 1863.

I hereby acknowledge service of the within by copy, the day above written.

JOHN M. DOUGLAS, *Att'y Ill's Cen. R. R. Company.*

Endorsed: Filed Dec. 2d, 1863.

WM. H. BRADLEY, *Clk.*

53 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a true transcript of the record and proceedings had in the cause wherein the York Manufacturing Company was plaintiff, and the Illinois Central Railroad Com-

pany was defendant, as the same appears from the records of said court, now remaining on file and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 3d day of December, A. D. 1863, and of our independence the 88th year.

[L. S.]

WM. H. BRADLEY, *Clerk.*

54 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America, to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also the rendition of a judgment, in a plea which is in the said court, before you, between York Manufacturing Company, plaintiff, and against Illinois Central Railroad Company, defendant, a manifest error hath happened, to the great damage of the said York Manufacturing Company, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf: You are hereby commanded that if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this thirteenth day of July, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the 88th year.

WM. H. BRADLEY, *Clerk.*

Filed 11th December, 1863.

55 In the Supreme Court of the United States, of the December term, A. D. 1863.

YORK MANUFACTURING COMPANY *against* ILLINOIS CENTRAL RAILROAD COMPANY. } In error.

And now comes the said York Manufacturing Company, plaintiff in error, and says, that the said judgment, by the said record verified, ought to be reversed, annulled and held for nought, for the many errors in the said record contained, and hereby assigns the same:

First. The court erred in allowing secondary evidence on the part of the defendant of an alleged special contract in writing between the parties, without proper foundation being laid therefor.

Second. The court erred in refusing to instruct the jury in regard to the delivery for carriage, according to the request of the plaintiff.

Third. The court erred in refusing to instruct the jury in regard to the elements and requisites of a special contract exempting a carrier from its common-law liability for loss by fire, according to the request of the plaintiff.

GALLUP & HITCHCOCK, *Att'ys for Plf. in Error.*

Filed 15th January, 1864.

Wm. C. Bryant & Co., Printers, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
Defendant in Error,
ads.
YORK MANUFACTURING COMPANY,
Plaintiff in Error.

The action is for 201 bales of cotton, received by the agents of the defendant in error, at Memphis, to carry to Boston, Massachusetts, which were burned after arriving at Cairo.

The declaration, with its amendments, contains seven counts, charging the defendant in error with being carriers, receiving the cotton, and failing to deliver it, and with negligence.

On the trial, it was shown, on the part of the plaintiff, that 201 bales of cotton were delivered by the steamboat *Adriatic* to the defendants, at Cairo, for carriage, on 11th November, 1859, and the loss thereof while in possession of the defendant.

The plaintiff then read the deposition of Thomas Trout, proving that Harris, Hunt & Co. were the agents of the defendant; that on the 8th November, 1859, his firm, Thomas Trout & Son, shipped 201 bales of cotton, for and on account

of the plaintiff, on steamer *Adriatic*, the value of which was $10,545 70.

This was the plaintiff's case.

The defendant then read the answers of the witness, contained in the same deposition, on cross-examination, stating that he made a contract with Harris, Hunt & Co., to ship the cotton from Memphis to Boston, which was in the form of a bill of lading, and signed by Harris, Hunt & Co., as agents of the defendant, two copies of which were delivered, one retained by Thomas Trout & Co., and the other sent to the plaintiffs, and of which a copy is given, as follows, page 9, fol. 30 :

" Shipped by Thomas Trout & Son, in good order and condition, on board the good steamboat *Adriatic*, whereof is master for the present voyage, now lying at Memphis, and bound for Cairo, being marked and numbered as below, and are to be delivered, without delay, in the like good order and condition, at the aforesaid port of Boston, Mass., (fire, and the unavoidable dangers of the river only excepted), unto Saml. Batchelder, receiver, or to his assigns, he or they paying fare at the rate of four $\frac{75}{100}$ dollars per bale, from Memphis to Boston, all rail from Cairo. In witness whereof, the master or clerk of said steamboat hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished the others to stand void. Y M C $1 *a* 201 (two hundred and one) bales cotton.

" Harris, Hunt & Co.,
" Ill. Central R. R.

The plaintiff objected to the introduction of this evidence, on the ground that the contract was unwritten, and no foundation had been laid for secondary evidence, either by notice to produce the original or proof of its loss; and further on the ground that the copy to which the witness testified, was attached to the cross-interrogatories, and to the commission, and suggested material matter to which the witness had not been examined in chief.

The record, however, shows that no motion had been made to suppress these parts of the deposition—that they were first objected to on the trial, and also that the paper was copied from the original in a book belonging to the witness—and that he had identified it in answer to the first cross-interrogatory — and that for these reasons the Court overruled the objection, and the plaintiff excepted [No. 1, fol. 32.]

After this ruling the plaintiff immediately proved the same exhibit in answer to the third cross-interrogatory (fol. 34), and gave testimony showing the value of the cotton, and rested.

The defendant then gave evidence to show that on the 8th day of November, 1859, the cotton was by Harris, Hunt & Company, defendant's agents at Memphis, shipped on the steamer *Adriatic*, for Cairo, on its route to Boston, and that the cotton was lost by fire while lying on a barge, into which it was discharged from the steamboat at the levee in Cairo, and that the defendant was not negligent in guarding it, and protecting it from such loss; (fol. 35, 36).

The plaintiff then gave evidence to show that Harris, Hunt & Company were agents authorized by the defendant to make contracts for transportaton of cotton, and tending to show that the defendant was negligent in guarding and protecting the cotton.

This was all the evidence.

The plaintiff thereupon prayed the Court to instruct the jury *six propositions*, which are set out at folio 39. The Court refused to instruct the jury in the form requested, but charged the jury substantially as follows:

1. That defendant might, by its agents, Thomas Trout & Son, make a contract with the plaintiff for the transportation of the cotton (fol. 41, 42).

2. That it might so make a contract at Memphis, with the same restrictions and conditions as if made at Cairo.

3. That if Thomas Trout & Son, acting as agents for the

plaintiff, made a contract for the transportation of the cotton, the only contract that would be binding upon the defendant, and which the plaintiff could enforce, would be the one so made.

4 That a bill of lading is, as to the quantity and quality of the goods shipped, a memorandum which may be explained, but in addition to this, it is a contract with precisely the effect of any other contract, by which a party receives property and agrees to transport and deliver it.

5. That it was for the jury to determine whether the cotton was delivered to the agents of the defendants, and whether they agreed to receive, hold, and transport it under the contract which has been referred to. If so, the bill of lading constituted the agreement, and we must look to its terms to ascertain what the contract was. (Fol. 41.)

6. That in this bill of lading there is an exemption from liability on account of loss by fire; that it is competent for a carrier to limit his responsibility in this respect, and if the jury should find there was a special contract exempting defendant from liability for a loss by fire, the defendant was, nevertheless, obliged to exercise due care of the cotton, and it was for the jury to find whether there had been such care exercised by it, and if the jury found there was a want of due care, then, notwithstanding, the provision in the contract, the plaintiff should recover.

The jury thereupon found a verdict for the defendant.

The exceptions were as follows:

First Exception.—To the reading of the answer to the second interrogatory—that the Exhibit A was a true copy of the contract made by the witness as agent for the plaintiff with the defendant's agent. (Fol. 30.)

2 Com. Mun. Rules 403
1 Graham New Trials, 653-664

I.—The ruling of the Court was proper, as to the matter of this exception, for the reason given in fol. 32; and further, because the bill of lading had been given in evidence without objection, in answer to the previous cross-interrogatory.
Fol. 30.

The Second Exception [fol. 34.] To the ruling of the Court that the answer of the witness "I understood the shipping bill as a receipt for the cotton, and not a contract" was not competent and excluding it from the evidence, was not well taken.

II.—The ruling here was correct. The opinion of the witness whether an instrument was or was not a contract, was not only immaterial but manifestly incompetent.

The third Exception was a general one, to the refusal of the Judge to charge the jury, the six propositions in the form requested by the plaintiff. (fol. 39 to 41.)

III.—A Court is not bound to follow the language of counsel in its instruction to a jury upon questions of law involved, or supposed to be involved, on the trial. A party has a right to have the charge upon questions of law, and if the Court refuse to charge upon them or if it charges erroneously and thereby a jury is

misled, the party is entitled to a new trial, but that is all. The Judge may use his own language, and if he does not mislead the jury. the verdict will stand.

12 New York, R., 236; Holbrook *vs.* Utica and S. R. R. Co.

7 Peters, 596; Scott *vs.* Lunt.

4 Sand., 451; Bulkeley *vs.* Kettletas. see p. 454–5.

"A verdict ought not to be set aside (where a Judge refused to charge) unless it manifestly appears that the omission of the Judge operated to the prejudice of the defendants." In *People* vs. *Gray*, 5 Wend., 290.

16 New York R., 407, Sperry *vs.* Miller.

(*a*) The first proposition was, under the evidence of the contract of transportation, immaterial. The delivery to the defendant's agent was in pursuance of the contract and the charge truly stated the rule in relation to it.

(*b.*) The charge of the Court properly stated the rule as to the plaintiff's second proposition.

(*c.*) The charge was correct in relation to the plaintiff's third proposition. The contract entered into shows what its terms were. It was sufficient for the defendant when asked to make a contract for the transportation to prescribe the terms it was willing to agree to, and it was not its duty to ascertain any secret or other reservation in the authority of the plaintiff's agent to contract.

(*d.*) The fourth and fifth propositions were not true as stated, and the Court charged the jury the true rule.

(*e.*) The charge of the Judge was substantially in accordance with the request. (Fol. 46, 47.)

IV.—The right of a carrier to make a special contract to restrict his common law liability against accidents by fire not originating from his own negligence, is well established in both England and America.

See 11 New York, p. 492, in Dorr *v.* New Jersey Steam Navigation Co., and the authorities there cited.

Com. on Cont., p. 779.

1 E. D. Smith, 115, Mer. In. Co., *v.* Chase, read from p. 129.

4 Bosworth, 225, Nevens *v.* Bay State Co.

5 " 699, Boswell *v.* Hudson R. Co.

10 Ohio, 64, Kitzmiller *v.* Van Rensselaer.

This rule is the law of Illinois.

19 Illinois: 136 Illinois Central R. R. Co. *v.* Morrison.

24 Illinois R., 466, The Western Transportation Company *v.* Newhall.

V.—The contract of transportation between the plaintiff and defendant expressly excepting the liability of the defendant for loss by fire, the question for the jury was whether the fire was occasioned by any want of due care by the defendant, and they having found it was not, the plaintiff was not entitled to a recovery, and the judgment of the Court below should be affirmed.

WILLIAM TRACY,
of Counsel for Defendant.

SUPREME COURT OF THE UNITED STATES,

December Term, 1864.

THE YORK MANUFACTURING COMPANY,
vs.
THE ILLINOIS CENTRAL RAILROAD COMPANY.

No. 181.

Error to the Circuit Court for the Eighth Circuit and Northern District of Illinois.

ABSTRACT OF RECORD.

The plaintiff is a corporation created by the State of Maine, and the defendant a common carrier from Cairo to Chicago. The action is *on the case* for the loss of 201 bales of cotton delivered to the defendant for carriage. *No contract* is alleged by the plaintiff, but its action is based upon the common law liability of the defendant as a carrier for hire. The general issue alone is pleaded. Proof was made of the delivery of the cotton at Cairo, on the 11th of November, 1859, by the Steamer Adriatic, to the regular receiving agents of the Illinois Central Railroad Company, at that place. It was discharged by the Steamer upon a barge owned by such agents, which was afterwards moved by them to the levee of the Illinois Central Railroad Company, where the cotton was burned at mid-day.

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The defendant set up by way of defence, a special contract, alleged to have been made at Memphis, for the carriage of the cotton, by which the plaintiff assumed the risk of loss by fire. The only evidence of such contract is contained in the deposition of Thomas Trout, of Memphis. The plaintiff sued out a commission to take the testimony of this witness, to prove the ownership and value of the cotton. To this commission the defendant attached a cross interrogatory and a *copy* of a bill of lading. The interrogatory and copy are in the following terms:

INTERROGATORY SECOND.

"Please inspect the paper purporting to be a bill of lading or "shipping bill, which is annexed and marked Exhibit 'A' (with "red ink), and state whether the same is a true copy of the contract "you made with Harris, Hunt & Co., for the shipment and trans- "portation of said cotton, or of the bill of lading given to you by "them, and whether you had any other or different contract with "or bill of lading from them."

COPY.

"Shipped by Thomas Trout & Son, in good order and condi- "tion, on board the good steamboat, called the Adriatic, whereof "——— is master, for the present voyage, now lying at Memphis, "and bound for Cairo. Being marked and numbered as below; "and are to be delivered, without delay, in the like good order and "condition, at the aforesaid Port of Boston, Mass., (fire, and the "unavoidable dangers of the river only excepted,) unto Samuel "Batchelder, Treasurer, or to his assigns, he or they paying freight "at the rate of four 75-100 dollars per bale, from Memphis to "Boston—all rail from Cairo. In witness whereof, the master or "clerk of said steamboat, hath affirmed to four bills of lading, all of "this tenor and date, one of which being accomplished, the others to "stand void."

"Y. M. C. ‡ 1@ 201.	"Two Hundred and One Bales Cotton. Harris, Hunt & Co., Agents Illinois Central Railroad."

This witness states that he purchased the cotton as the commission merchant of the plaintiff; that a bill of lading was signed by Harris, Hunt & Co., agents of the defendant, after the delivery upon the steamer, and after it was signed by the clerk of the boat; that he did not examine it; that his attention was not called to the fire clause; that he had no authority to make a special contract for the plaintiff by which it should assume the risk of loss by fire, and that he supposed it a receipt and not a contract. He states that the instrument attached to the commission is a copy.

No proof was offered of the loss of the original instrument, or that it was unattainable, or of notice to the plaintiff, or its attorney, to produce it, as a foundation for the introduction of secondary evidence of its contents.

The plaintiff resisted the introduction of this evidence upon the following grounds:

1st. Because several originals were shown to be in existence, and no foundation was laid for the introduction of secondary evidence of their contents.

2d. Because it appeared that the copy was attached to the cross interrogatory and commission by the attorneys of the defendant before it issued, and that such question and copy suggested to the witness material matter to which he had not been examined in chief.

The copy was admitted in evidence, and exception taken to the ruling of the Court.

The validity of such contract was denied upon the trial:

1st. Because it appeared that Thomas Trout was a special agent of the plaintiff only for the purchase and shipment of the cotton, and had no authority to make an unusual contract exempting the defendant from its common law liability, and that the defendant had never assented to the terms of it.

2d. Because it did not appear that any consideration existed to support a special contract, releasing the defendant from its common law liability as an insurer.

3d. Because the defendant had no power to contract to carry from Memphis to Boston, and as the plaintiff did not obtain the engagement of the defendant, it was not bound by the restriction.

4th. Because the alleged contract was an ordinary steamboat bill of lading, and on the face of it showed that the parties had reference only to the river navigation, and that the signature of Harris, Hunt & Co., was obtained only to bind the Railroad Company upon its delivery at Cairo.

The plaintiff then offered to read to the jury the following statement of the witness on the cross examination, to wit:

"I understood the shipping bill as a receipt for the cotton, and not a contract. I did not examine the shipping bill, and my attention was not called to the 'fire clause'" as tending to show that he did not assent to the terms of the contract, but the Court refused to allow it to be read, and exception was taken.

The plaintiff also read in evidence, without objection, a letter of the freight agent of the defendant to Harris, Hunt & Co., fixing a tariff of charges on cotton at less than the rate specified in the bill of lading or receipt.

The plaintiff asked the Court to give the following instructions, previously reduced to writing:

1st. If the jury shall believe from the evidence that the cotton was delivered by the Steamer Adriatic, at Cairo, according to the usual course of business in like circumstances at that place with the Illinois Central Railroad Company, then such delivery was sufficient to charge the company with its receipt for carriage.

2d. The burden of proving a special contract limiting its common law liability lies on the carrier, and nothing short of an express stipulation by parol or in writing, can discharge it from duties which the law has annexed to its employment. The exemption from these duties should not depend upon implication or inference founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties.

3d. The burden lies upon the carrier of proving the assent of some authorized agent of the plaintiff to the terms of the special contract, limiting the common law liability of the defendant.

4th. The burden lies upon the carrier to prove a consideration for the special contract exempting the carrier from its common law liability for loss by fire, and without such consideration, the contract has no legal validity.

5th. The mere receipt of the cotton for carriage, according to the usual course of business of the defendant, is not a sufficient consideration to support the special contract.

6th. If the jury shall find from the evidence that there was a special contract between the parties, by which the defendant was released from its common law liability for loss from fire, yet the defendant is liable, if it did not take the same care to protect and secure the cotton, that a prudent man would have taken of his own property, under like circumstances, and the loss resulted from the want of such care.

The Court refused each of these instructions, and to such refusal exception was taken. The Court thereupon charged the jury in substance, as it seems to counsel for the plaintiff:

1st. That the authority of Thomas Trout & Son to make such contract was immaterial to the issue.

2d. That the assent of the owner to the terms of the contract was also immaterial.

3d. That it is competent for the carrier alone, to limit its liability without the engagement of the owner.

4th. The jury were led to infer from the whole charge that the question whether such a contract was made, was not for them to determine, but was to be assumed in their deliberations.

ARGUMENT OF PLAINTIFF IN ERROR.

I

The extraordinary error in this record is the admission of secondary evidence, of a written contract, in every way essential to the defence, without any, the least foundation being laid for it by notice, at any time, to produce the original, or proof of its loss, or that it was unattainable.

The rule that notice to produce, or the loss of, the original, should be shown before parol evidence of the contents of a written instrument is admissible, it is believed, has rarely been questioned.

1 *Greenleaf on Ev.*, §558 *and* §560.
2 *Sanders on Pl. & Ev.*, 833, *et seq.*
De Lane et al. vs. Moore et al., 14 *How.*, 263.
Taylor vs. Riggs, 1 *Peters*, 591.

This rule is in strict accordance with the practice of the Supreme Court of the State within which this case was tried.

Bushnell vs. Bishop Hill Colony, 28 *Ill.*, 204.
Matteson vs. Noyes, 25 *Ill.*, 591.
Warner vs. Campbell, 26 *Ill.*, 282.
Cummings vs. McKinney, 4 *Scam.*, 59.
Palmer vs. Logan, 3 *Scam.*, 56.
Ferguson vs. Miles, 3 *Gilman*, 364.

The only exceptions to this rule recognized in the elementary treatises on the laws of evidence, or in any reputable decisions, are,

1st. Where a duplicate original is offered as secondary evidence. This case is, however, rather not within the rule than an exception to it.

2d. Where the instrument to be produced is itself a notice.

3d. Where from *the nature of the action*, the adverse party has notice that it is intended to charge him with the possession of the instrument, as in trover for a bill of exchange.

Certainly the case under argument is within no established exception to the general rule.

The argument by which the admission of this evidence is supported appears in the bill of exceptions.

The first reason assigned for the admission of it is, that it was first objected to on the trial. Now, from the very nature of the case, it could not have been properly objected to at any other time. It was a substantial and not a formal objection, and such are always heard at the trial. There is no rule or practice of the Court requiring any other than formal objections to be stated in writing before the cause is called for trial. If a motion to suppress had been urged before the trial, it would have been said in reply, that the testimony might be made competent before it would be offered, by showing a notice to produce the original, or that it was unattainable, by destruction or otherwise. Could the Court assume, for the purpose of suppressing a deposition, that the requisite proof would not be made to render it competent?

The second reason assigned for the admission of this evidence is, that it appeared that the paper was copied from the original, in a

book which belonged to the witness, and that he had already identified the same paper as a copy in his answer to the first cross interrogatory. Now, this reason has never been made the ground of an exception to the general rule, by any writer upon the law of evidence, or by any court, so far as can be learned by search of the authorities.

Certainly, it does not show that the original was unattainable. No reason appears to excuse all effort to obtain the book containing it. The witness does not decline to produce it. He is not even requested to do so. Three other originals were in existence, and one of them, probably, in the hands of the defendant. That the witness, in answer to the first cross interrogatory, identified the copy as such, without giving its contents, but increases the force of the objection to it.

It was remarked by Justice Story, in the case of *Nicholls vs. Webb*, 8 *Wheat.*, 326, that "the rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts are, therefore, extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles." If any new doctrine of evidence is to be introduced, the foundation of it should at least rest upon some clearly defined principle.

II.

This secondary evidence was admitted in answer to a cross interrogatory, suggesting material matter of defence, to which the witness had not been examined in chief, and the copy was attached to the commission and the interrogatory, by the attorney for the defendant. This was clearly irregular and erroneous.

The rule is well established by an adjudication of this Court, that a party has no right to cross examine a witness, except as to facts and circumstances connected with matters stated in his direct examination.

Phil. & Trenton R. Co., vs. Stimpson, 14 *Peters*, 448.

III.

The chief error in this record is found in the charge to the jury, in regard to the requisites of a special contract between the owner and the carrier. It is, perhaps, too late to argue that a common carrier may not, by express stipulation of the owner, discharge himself from a liability which the law has annexed to his employment. It is believed that policy and principle concur in requiring that all such special contracts should be deemed nullities. The law imposes upon the carrier a definite and absolute duty, and he ought to be under an incapacity to contract in derogation of that duty. Such contracts are usually an empty form of words, imposed by a party who has no right to propose them upon another who has no power to repel them, and who rarely, in any sense, assents to them.

The reasoning of Judge Cowen, in the case of *Cole vs. Goodwin*, 19 *Wend.*, 251, and in *Gould vs. Hill*, 2 *Hill*, 263, and of Judge Nesbitt, in the case of *Fish vs. Chapman*, 2 *Kelly*, 349 is more satisfactory upon principle and authority than that of later cases, establishing a somewhat different rule. Mr. Wallace, the American Annotator of Smith's Leading Cases, notwithstanding the case of *The New Jersey Steam Navigation Compang vs. The Merchants' Bank*, 6 *How.*, 344, regards the question whether a carrier, when charged upon his common law responsibility, can discharge himself from it by showing a special contract, assented to by the owner, as an open one, and as not decided by that case. He regards that case as giving effect to a special agreement of a peculiar kind, between an Express Agent and Steamboat Company, and as involving a totally different question. The plaintiffs, in that case, claimed through the special agreement and affirmed its provisions, and of course were bound by all its stipulations.

A different view of this decision has, however, been taken by the Courts of New York and Illinois, and the rule, after great conflict, has become established. Many of the best judges and text

writers have regretted the tendency of modern decisions upon this subject, and have shown a disposition to limit the operation of such contracts.

The evils springing from these special contracts have been found so great in England, that Parliament has passed a Railway and Traffic Act, 17 & 18 *Vict., c.* 31, requiring that such contracts shall be signed by the shipper, and shall be just and reasonable.

It is now a settled principle in our law, that a notice brought home to the shipper will not exonerate the carrier from the liabilities which the law has annexed to his employment If, however, the owner expressly assents to such notice and agrees to be bound by it, the courts will, according to later authorities, give effect to such agreement.

In the case now under argument, the Court was requested to instruct the jury that the burden was upon the carrier to prove the assent of some authorized agent of the plaintiff, to the terms of the special contract, limiting the common law liability of the defendant.

This instruction was refused, and the jury was charged as follows:

"Mr. Trout says that his attention was not called to the fire clause in the bill of lading, and that he had no authority to ship the cotton under the restriction therein contained. It is not material as to the authority of Thomas Trout & Son, from the plaintiff. They acted as the agents of the plaintiff, and if, as such, they shipped the cotton, and made a contract with the defendant for its conveyance over the road, then the only contract that would be binding on the defendant, and which the plaintiff could enforce, would be the one so made; unless, indeed, the defendant knew Thomas Trout & Son were acting for the plaintiff, and that they exceeded their authority.

"Now, the question for you to determine is, was this property delivered to the agents of the defendant, and did they agree to receive, hold and transport it under this contract which has been

referred to? If so, then, as a matter of course, as above stated, it is the only contract by which the rights and liabilities of the parties are to be measured. And it is generally true, that when goods are delivered to a carrier, either by land or by water, and a bill of lading is given, by which the carrier agrees to convey them for a fixed price, the bill of lading constitutes the agreement between the parties. And if the cotton was delivered under this bill of lading, as the agreement of the defendant for its transit over the road, then we must look to its terms, in order to understand what the contract was.

"The general rule is, that a common carrier is responsible for all losses, except those occasioned by the act of God, or the public enemies. It is competent, however, for the carrier to limit his responsibility, and there can be no doubt, particularly in relation to so inflammable a material as cotton, that the defendant could legally exempt itself from liability by a special contract. And if it has so done, then, in case of loss by fire, it could only be responsible in a certain contingency, to be hereafter considered."

The assent of the owner and the authority of the agent to make such a contract are regarded as *immaterial*. They need not in way be proven. This is essentially the doctrine that the carrier may limit his liability by notice. A special contract to which the owner does not assent, is a contradiction in terms. It is in substance but a notice or declaration of the conditions upon which the carrier will exercise his employment. This charge can be supported by no authority.

In the *6th Howard*, 381, the Court lay down the rule as follows: "But, admitting the right of a party to restrict his liability by express stipulation, it by no means follows that he can do so by any act of his own, that is, by a general notice. The common carrier is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself, *without the assent of the parties concerned.*" "The burden of proof lies on the carrier, and nothing short of an express

stipulation, by parol or in writing, should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties."

The assent of the owner is here made an essential requisite, and the contract before the Court was signed by the parties.

In the case of the *Illinois Central Railroad Co. vs. Morrison*, 19 *Illinois*, 136, the special contract to which the effect was given, was signed and sealed by the owner, and was made in consideration of reduced rates of freight. The Court say, "the defendants have paid a valuable consideration for the risks assumed by the plaintiffs, by accepting reduced rates, and the plaintiffs have had the full benefit of the reduction. It would be great injustice to require the company to pay for escaping risks, and then burden them with the losses against which, by fair contract, they have purchased exemption." The Court also advert to the fact that the terms were "agreed upon specially."

In the case of the *Western Transportation Co. vs. Newhall et al.*, 24 *Ill.*, 466, it was again decided that the express assent of the owner to such restriction must be proved, in order to give effect to it.

In the case of *The American Transportation Co. vs. Moore et al.*, 5 *Mich.*, 371, the defendants asked the Court to instruct the jury, "That if the jury believe from the evidence that the plaintiffs directed the merchants in New York, of whom they bought the goods, to forward them by the defendant's line, and the merchants did so, and, on delivery of the goods to defendant's agent, accepted bills of lading or shipping receipts therefor, containing a clause exempting the defendant from risks of fire, then their acceptance binds the plaintiffs, and the plaintiffs cannot recover for any goods included in such bills of lading or receipts."

This instruction the court refused, and the Supreme Court of Michigan held that it was rightly refused, as the authority of the agents to make such a contract was a question of fact for the jury.

In the case of the *Michigan Central Railroad Co. vs. Hale*, 6 *Mich.*, 257, it is expressly held that "the assent of the owner to the limitation is necessary; that this is a question of fact for the jury, to be determined by evidence *aliunde*, and is not the subject of presumption from the terms of the receipt alone." The Court say that "if it appear that the price of freight was made lower in consideration of such special restriction, and that the party has received the benefit of such reduction, such fact would furnish strong evidence of assent." But in the case now before the Court it is shown that the plaintiff contracted to pay full rates. The letter of Forsythe, the freight agent, (Record, page) fixes the rate from Cairo to Boston at $3.60 per bale; the rate contracted to be paid was $4.25 per bale.

It is difficult to see how a contract can be made without the assent of the parties to it. If one party is a corporation, such assent can only be by an authorized agent. It is true such authority may be implied, but not from the mere possession of goods with authority to ship. An authority to forward, is not an authority to make an unusual and special contract, restricting the liability of the carrier. Such authority is a question of fact, to be dealt with by a jury under proper instructions. The charge to the jury in this case is based upon the theory, that the carrier *alone* may determine the limits of his liability, and that the assent of the plaintiff is wholly immaterial. It is said, it is true, that he may do this only by special contract; but this singular contract, made without the assent of one party to it, differs in no respect from a general notice brought home to the shipper, which is universally held inefficacious.

The charge seems to be based also upon the theory that a carrier can only be made liable through the medium of a contract—that no common law liability rests upon him. This language is used: "Thomas Trout & Son acted as the agents of the plaintiff,

and if, as such, they shipped the cotton and made a contract with the defendant for its conveyance over the road, then the only contract that would be binding on the defendant, and which the plaintiff could enforce, would be the one so made; unless, indeed, the defendant knew Thomas Trout & Son were acting for the plaintiff, and that they exceeded their authority."

Now, if the plaintiff had brought suit on *a contract*, and thereby affirmed its provisions, this reasoning would have been sound; but the plaintiff seeks to charge the defendant upon its common law duty, and it does not follow, that if there was no contract there was no obligation. In the absence of a contract, that obligation was fixed by the law.

IV.

The Court was also requested to instruct the jury that "the burden lies upon the carrier to prove a consideration for the special contract exempting the carrier from its common law liability for loss by fire, and without such consideration the contract has no legal validity." The Court refused to give this instruction, and in no part of the charge is any language to be found importing that a consideration is requisite to suppport a special contract of this nature. The jury were denied the legal definition of a contract, although the controversy was mainly upon this point. Every parol agreement, whether for the acquisition of a new right or the relinquishment of one previously existing, requires a consideration which must be sufficient, though it need not be adequate. The right which the law gives every man to have his goods carried by the common carrier, at the carrier's risk, is at least as binding as if it originated in a prior contract and upon an executed consideration, and cannot be waived without a new and sufficient consideration for its relinquishment.

"This cannot be found in the carriage of the goods, for the carrier is bound not only to carry them, but to carry them safely

or answer for the loss, and cannot make the fulfillment of one part of his duty the means of obtaining an exoneration from the rest."

Note, 7 *Welsby, H. & G.*, 716.

It will be found that in all the cases in which effect has been given to these special contracts with carriers, by which their common law liability was limited, this essential requisite of a contract has been found.

In the case of the *New Jersey Steam Navigation Co. vs. Merchants' Bank*, 6 *How.*, 344, a full consideration is expressed in the instrument, which is, moreover, signed by the parties and under seal.

In the case of *Ill. Central R. R. Co. vs. Morrison et al.*, 19, *Ill.*, 136, a full consideration in the reduction of the rate of freight was proven, and the contract was also signed and sealed.

In the case of *Kimball vs. Rut. and B. Railway*, 26 *Vt.*, 252, a consideration of the same nature was fully proven, and the assent of the plaintiff in express terms.

V.

The Court was also requested to instruct the jury as follows:

"The burden of proving a special contract, limiting its common law liability, lies on the carrier, and nothing short of an express stipulation by parol or in writing, can discharge it from duties which the law has annexed to its employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence, but should be specific and certain, leaving no room for controversy between the parties."

This instruction in substance should have been given. It is the rule announced by this Court in the 6*th Howard*, 344, after great deliberation, and is designed for the protection of the public.

When it is considered that railway companies are common carriers by their charters; that it is questionable whether they ought to be permitted to contract for exoneration from duties they have voluntarily assumed; that in case of loss, the only evidence of the attending circumstances must be sought among their own employees; that they may, in all cases, fix the rate of carriage so as to cover a premium for insurance, and that they may, without inconvenience, require the express assent of the owner, to be evidenced by his signature or otherwise; it is believed that the rule, as stated, is liberal to the railways, while it is a safe one for the public.

The authorities cited in the foregoing brief, fairly present the views with which the Courts have met the persistent efforts of these powerful companies to engraft the law of shipping, and the immemorial custom of carriers by water, under bills of lading, upon the ancient principles of the law of carriers by land. Able counsel are always in the interests of these companies, and they have succeeded in impressing their views upon the courts to an alarming extent. The security of the public, who must employ these companies, and who are altogether in their power, demands that every reasonable safeguard should be provided against an involuntary release by the shipper from their obligation under the law.

CHAS. HITCHCOCK,

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